***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

Orig w/ affidavit of mailing

# 76-1233

*To be argued by*
GARY A. WOODFIELD

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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 76-1233**

UNITED STATES OF AMERICA,
*Appellee,*

*—against—*

EDUARDO RUA and HECTOR GARCIA,
*Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## BRIEF FOR THE APPELLEE


DAVID G. TRAGER,
*United States Attorney,*
*Eastern District of New York.*

ALVIN A. SCHALL,
GARY A. WOODFIELD,
*Assistant United States Attorneys,*
*Of Counsel.*

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### Preliminary Statement

Eduardo Rua and Hector Garcia appeal from judgments of conviction on a two count indictment charging each with unlawfully possessing 704 cases of liquor which had been stolen from interstate commerce (18 U.S.C. §§ 659 and 2) and related conspiracy (18 U.S.C. § 371), which convictions were entered in the United States District Court for the Eastern District of New York on May 21, 1976, after a jury trial before the Honorable Thomas C. Platt. Appellant Rua was sentenced to concurrent terms of imprisonment of five years on each count and a total fine of $5000 ($2500 on each count). Appellant Garcia was sentenced to concurrent terms of imprisonment of two years on each count. Rua and Garcia are free on bail pending appeal.

On appeal appellants contend that there was insufficient probable cause to permit agents of the Federal Bureau of Investigation ("FBI") to conduct warrantless searches of two trucks driven by Garcia on March 19, 1974, and that the district court thus erred in allowing the introduction into evidence of the stolen liquor seized from those trucks.

Appellants further contend that statements which they gave were improperly admitted into evidence, contending that they were outgrowths of the illegal search. Appellant Rua also claims that the district court erred in not conducting a hearing to determine the voluntariness of his statement prior to its introduction and that it further erred in its instructions to the jury concerning that statement. Finally, appellant Rua argues that the evidence against him was insufficient to convict.

## Facts

On March 19, 1974, Phillip Gallegos, driving a Sealand tractor trailer, was hijacked by two armed men in Secaucus, New Jersey (S. 4, 5, T. 17, 18).[1] Later that evening, Special Agent Kosednar of the FBI discovered Gallegos' hijacked tractor trailer abandoned on the lower east side of Manhattan (S. 5, T. 33). Found in the trailer were approximately 200 cases of vodka remaining from the original load of approximately 1000 cases of Blansac Brandy and Majorska Vodka valued in excess of $27,000 (S. 5, T. 24, 27, 34).

Pursuant to information received from a confidential informant as to the whereabouts of the stolen liquor, the

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[1] References preceded by "S" are to the transcript of the suppression hearing held on March 19 and 22, 1976. References preceded by "T" are to the trial transcript.

next morning, March 20, 1974, FBI agents established a 24 hour surveillance at "Mini City Wholesalers," a warehouse located at 187 Kent Avenue, Brooklyn, New York (S. 47, 48, 56).

There was no activity at this warehouse until the morning of March 22, 1974, when the appellant Hector Garcia and another individual were observed entering the warehouse in a rented truck (S. 58, T. 40, 44, 136). Shortly thereafter, this truck exited the warehouse and was left parked outside until approximately 1:00 P.M., when Garcia and another individual returned to the truck and departed (S. 58, T. 45). Mobile surveillance by FBI vehicles of this truck driven by Garcia followed it on a circuitous journey through Brooklyn—which included pauses at the side of the road and a U-turn in the middle of a block—eventually ending at 406 Remsen Avenue in Brooklyn at approximately 2:30 P.M. (S. 62, 63, T. 46, 47, 48, 136, 137). Garcia and his companion exited the truck and were lost by the FBI surveillance (S. 64 T. 51).

At approximately 4:00 P.M. on March 22, 1974, a second rented truck was observed entering the warehouse at 187 Kent Avenue Brooklyn (S. 7, T. 63, 64). An hour later when this truck exited the warehouse and stopped so that the driver could close the warehouse doors, FBI Agent Teel approached and observed a case of Blansac Brandy on the truck's front seat (S. 10, 20, T. 69). Agent Teel approached the driver, Garcia, and asked him what was in the truck. Garcia responded that he didn't know (S. 10, 35, T. 66). Garcia was also unable to produce any shipping papers (T. 66). In response to Agent Teel's questions regarding the case of brandy on the front seat of the truck, Garcia merely "shrugged" (S. 10, T. 66). At this point the agents unlocked the truck and found it filled with cases of Blansac Brandy

whose serial numbers corresponded to those from the March 19, 1974, stolen shipment (S. 12). At this time Garcia was placed under arrest (S. 12). After being advised of his rights, Garcia stated that he had been instructed by appellant Rua to rent the two trucks (the one he had just driven from the warehouse and the one on Remsen Avenue) and to load them with the liquor in Rua's warehouse (T. 88-91, 201). At approximately 9:00 P.M. that evening, agents who had maintained surveillance of the truck previously abandoned at 406 Remsen Avenue, Brooklyn, opened the unlocked truck and seized its contents, which were found to be cases of vodka stolen from the March 19, 1974, shipment (S. 64, 65, T. 53). The warehouse at 187 Kent Avenue was never entered by the agents.

Subsequent FBI investigation determined that appellant Garcia used a false driver's license when he rented the two 4G's trucks on March 22, 1974 (T. 104, 145, 158). Further investigation by the FBI revealed that located in the warehouse which stored the stolen liquor was a financially troubled wholesale grocery business, "Mini City Wholesalers", established by appellant Eduardo Rua in September, 1973 (T. 108, 121). This business was financed by an $80,000 SBA loan whose first payment became due on March 1, 1974 (T. 122, 123). Upon appellant Rua's request to delay this initial payment, Thomas O'Donnell, an assistant treasurer of Chase Manhattan Bank, met with Rua and requested of him a financial statement of his business (T. 126, 127). This statement, which covered the first four months of operation, showed a gross loss (T. 132). Evidence adduced at trial further showed that Rua had failed to pay both his March rent for the 187 Kent Avenue warehouse and the first payment of his SBA loan (T. 109, 123). Attempts to locate Rua by Frank Allen, owner of the warehouse at 187 Kent Avenue, and Thomas O'Donnell proved fruitless (T. 109, 128).

After a year-long effort by the FBI to locate Rua, he was arrested in Puerto Rico on June 19, 1975, and brought to New York, the next day (T. 145, 146). On June 20, 1975, after signing an advise of rights form provided him by FBI Agent Morrill, Rua gave a written statement advising that he had been approached in March, 1974, to use his warehouse to store stolen goods but he rejected the offer (T. 147, 148, Ex. 24). Thereafter, Rua was interviewed by Agent Ponzio concerning his SBA loan (T. 293). During this interview, Rua advised Agent Ponzio that he left New York for Puerto Rico after his friend Garcia was arrested (T. 296).

At trial both appellants testified. Garcia admitted renting the two 4EG's trucks with a license provided him by one of his co-workers at "Mini-City Wholesalers" and loading the trucks with the liquor which was in the warehouse (T. 172, 178). He claimed that he was instructed to perform these tasks by his co-worker "Marcos" (T. 172). However, Garcia admitted telling the FBI at the time of his arrest that it was Rua who issued these instructions (T. 201). Garcia also admitted telling FBI Agent Morrill on December 18, 1975, that one "Matias" had told him to rent the trucks and load the liquor on March 22, 1974 (T. 225). Moreover, Garcia admitted lying to the FBI agents when he told them that he had found the drivers license he used to rent the trucks (T. 226, 227).

Rua testified that he had been approached to use his warehouse to store stolen goods for $1000 a day but had rejected the offer. Rua stated that he was in Puerto Rico when he learned that Garcia had been arrested and stolen liquor had been discovered in his warehouse (T. 250, 252). He stated he never returned to his warehouse, abandoning his business and in excess of $60,000 in inventory (T. 264, 265).

In rebuttal the Government introduced the statement Rua provided to FBI Agent Ponzio concerning Rua's SBA loan default, wherein Rua stated he did not leave for Puerto Rico until after Garcia was arrested. (T. 296).

## POINT I

### The searches and seizures were reasonable and based on probable cause.

Appellants Rua [2] and Garcia initially contend that the district court erred in finding that probable cause existed to search the trucks driven by Garcia on March 22, 1974. Essentially, they support this argument with the assertion that the Government, by failing to meet the two-pronged standard announced in *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Spinelli* v. *United States*, 393 U.S. 410 (1969), failed to establish probable cause.

We do not contest the validity of the *Aguilar-Spinelli* standard; rather, we contend that the appellants' reliance upon this standard on the facts in this case is misplaced. The *Aguilar-Spinelli* rule deals with hearsay affidavits used to obtain search warrants which reflect that probable cause rests or falls on informant information. *United States* v. *Canieso*, 470 F.2d 1224 (2d Cir. 1972). This case is simply not of that variety. Here we have an informant (whose identity the Government chose not to reveal) who led the agents to the location of the stolen liquor, where their observation appellant Garcia pro-

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[2] The discussion here in Point I concerning Rua is based on the assumption that he had standing to challenge the search of the trucks driven by appellant Garcia. We contend (Point II, *infra*) that the district court properly found that Rua did not have standing to contest the validity of these searches.

vided probative indications of criminal activity, the combination of which indications was more than sufficient to give reasonably prudent agents probable cause to believe that a crime was being committed. We submit that it was this probable cause, coupled with the facts of moving vehicles and the activities of an unknown number of participants, which created exigent circumstances necessitating action by the agents without delay for a search warrant.

While the informant's identity was not revealed, testimony at the suppression hearing disclosed that he had supplied information which had led to many arrests (S. 47, 48). The information which he provided on the day of the hijacking led the agents directly by the location of the stolen liquor—187 Kent Avenue, Brooklyn (S. 48, 49, 57). Once there, the agents established a 24 hour surveillance of this warehouse, which revealed no activity until the morning of March 22, 1974. Furthermore, their investigation revealed that located at this warehouse was "Mini-City Wholesalers", a grocery distributorship which the agents knew did not deal in liquor (S. 13). Moreover, having found the hijacked tractor trailer abandoned in Manhattan on the evening of March 19, 1974, the agents could reasonably assume that the stolen goods were already located in a "drop" (S. 5).

On March 22, 1974, at approximately 8:45 A.M., appellant Garcia was observed arriving in a 4 G's rental truck and entering the warehouse, closing the door behind him (S. 58, T. 40, 44). That truck was subsequently parked outside the warehouse and left until Garcia returned at approximately 1:00 P.M. and drove the truck away (S. 58, T. 45). Garcia drove this truck, which was followed by numerous FBI surveillance vehicles, in a circuitous route through Brooklyn, finally parking at 406 Remsen Avenue where surveillance of Garcia was lost at

approximately 2:30 P.M. (S. 62, T. 46, 47). Agent Colgan, an FBI agent who had participated in 75 to 100 automobile surveillances in his 6 years as an FBI agent, was of the opinion that Garcia had spotted the FBI surveillance and, thus, abandoned the truck (T. 50). Nevertheless, surveillance of this truck continued until 9:00 P.M. that evening when agents entered the unlocked truck which still had the keys in it, and discovered a portion of the stolen liquor (S. 64, 65, T. 53).

The agents who remained on surveillance back at the warehouse observed Garcia return at approximately 4:00 P.M. and enter the warehouse in another 4G's rental truck. (S. 7, T. 64). When Garcia exited approximately an hour later, Agent Teel observed on the truck's front seat a case of Blansac Brandy, the same brand as that hijacked three days earlier (S. 19, 20). Agent Teel, identifying himself, approached Garcia and asked him what was in his truck, to which Garcia responded to the effect that he did not know (S. 10, 35, T. 66). When asked as to the ownership of the case of brandy on the truck's front seat, Garcia merely "shrugged" (S. 10, T. 66). Armed with their observations, coupled with Garcia's evasive responses, the agents opened the unlocked truck and discovered the March 19 stolen liquor (S. 12, T. 68). Thereafter, acting on information concerning the seizure at the warehouse, agents surveilling the truck abandoned by Garcia on Remsen Avenue, approached it, opened it and found it to also contain liquor taken in the March 19 hijacking (S. 64, 65, T. 53).

The very term "probable cause" implies that we are dealing with probabilities and not legal technicalities. The probability in this case was clear. Based on a practical understanding of the developing circumstances,—in particular the informant's information, the agents' ob-

servations ((i) Garcia driving the first 4G's truck to avoid surveillance, (ii) his apparently abandoning it on Remsen Avenue, (iii) Garcia moving the second 4G's rental truck and (iv) the case of brandy on the front seat of the truck) and Garcia's evasive responses to Agent Teel—the agents were warranted in believing that stolen goods were being transported in the second 4G's truck. *Carroll* v. *United States*, 267 U.S. 132, 162 (1925); *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949); *Draper* v. *United States*, 358 U.S. 307, 313 (1959). The fact that moving vehicles created exigent circumstances requiring the agents to move quickly obviated the necessity of a warrant. *Carroll* v. *United States*, *supra*, at 153; *Chambers* v. *Maroney*, 399 U.S. 42, 46-52 (1970), *United States ex rel. LaBelle* v. *LaValle*, 517 F.2d 750, 755-756 (2d Cir. 1975), *cert. denied*, — U.S. —, 96 S.Ct. 803 (1976). Therefore, the agents had probable cause to stop Garcia and search the 4G's truck. Once it was determined that the first 4G's truck contained liquor stolen from an interstate shipment, it was proper to arrest Garcia and search the 4G's truck on Remsen Avenue. *Cf. United States* v. *Dalli*, 424 F.2d 45, 48 (2d Cir.), *cert. denied*, 400 U.S. 841 (1970). Since these searches were reasonable and based upon probable cause, as the district court so found, it was proper to introduce into evidence the seized stolen liquor, as well as appellants' statements made after their lawful arrests.[3]

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[3] It can hardly be argued that appellant Rua's arrest was unlawful. The stolen liquor was observed being driven from the warehouse which he was renting. Further probable cause was provided by the investigation into his finances and by his apparent flight.

## POINT II

**The district court properly found that appellant Rua lacked standing to contest the search of the trucks driven by appellant Garcia.**

Appellant Rua contends that the district court erred in finding that he lacked standing to contest the search of the trucks driven by Garcia. Since Rua was not in either truck at the time of the search and had no proprietary interest in the trucks, his standing to object to the validity of the search is necessarily based on the automatic standing rule, which was enunciated in *Jones* v. *United States*, 362 U.S. 257 (1960), and which affords automatic standing where the defendant is charged with a possessory offense and the possession alleged in the indictment occurred at the same time as the search. See, *United States* v. *Tortorello*, 533 F.2d 809 (2d Cir. 1976).

We submit that the reasoning of *Jones* is plainly erroneous and should no longer be followed. Quite simply, we contend that appellant, whose Fourth Amendment rights have not been violated by the search and seizures performed in this case, should have no standing to object to the legality of those search and seizures.

As was observed by Judge Oakes in *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1205 n.4 (2d Cir. 1973), the automatic standing doctrine announced in *Jones* "has been questioned" in *Brown* v. *United States*, 411 U.S. 223 (1973), and is of "dubious validity." The dilemma which gave rise to the *Jones* decision has been resolved by *Simmons* v. *United States*, 390 U.S. 377 (1968). No longer is a defendant faced with the Hobson's choice of sacrificing his Fifth Amendment privi-

lege against self-incrimination (by testifying at a suppression hearing to demonstrate his standing) in order to vindicate his Fourth Amendment rights.

Although the purpose of the newly coined rule announced in *Jones* was clear, Justice Frankfurter chose to rest the rule on an analysis totally unrelated to the defendant's dilemma, relying instead on an inconsistency which he perceived in the Government's argument (362 U.S. at 263):

> Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government.

We submit that this reasoning is plainly erroneous and should no longer be followed. The prosecution here is not subjecting the defendant to "the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation." The Fourth Amendment does not confer any "remedies" on one who is in the "situation" of being a lawless possessor of property. A violation of a person's Fourth Amendment rights arises not from the taking of contraband by a person but because of the manner in which the contraband is removed from either his person, home, or

other place where he has a reasonable expectation of privacy. See, *Katz* v. *United States*, 389 U.S. 347 (1967). Since no right of privacy of Rua's was infringed, the legality of the search and seizures of March 22, 1974, should, as far as he is concerned, be entirely immaterial.[4]

In any event, since the trial court concluded correctly that the search was lawful, appellant Rua was not prejudiced by the threshold finding of the district

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[4] Even assuming the continued validity of the automatic standing rule, it is clear that for Rua to succeed in his effort to establish the requisite standing to challenge the search he must show under *Brown* v. *United States*, *supra*, that possession of the seized liquor at the time of the contested search and seizure is an essential element of the crimes charged in the indictment. See, *United States* v. *Capra*, 501 F.2d 267, 272 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *United States* v. *Hearn*, 496 F.2d 236 (6th Cir. 1974), *cert. denied*, 419 U.S. 1048 (1974).

Here, Rua was charged and convicted of two counts, possession of stolen goods (18 U.S.C. §§ 659 and 2) and conspiracy (18 U.S.C. § 371). Decisional authority abounds to the effect that, though the substantive offense may be a possessory crime, charges, as here, of conspiracy and aiding and abetting unquestionably are not. See, *e.g.*, *United States* v. *Valencia*, 492 F.2d 1071 (9th Cir. 1974); *United States* v. *Hutchinson*, 488 F.2d 484 (8th Cir. 1973); *United States* v. *Sullivan*, 488 F.2d 138 (5th Cir. 1973); *United States* v. *Sacco*, 436 F.2d 780 (2d Cir.), *cert. denied*, 404 U.S. 834 (1971). The evidence both at the suppression hearing and at trial never proved Rua's possession of the stolen liquor, merely that he aided and abetted Garcia in his physical possession, *i.e.* that he participated in the venture as something he wished to bring about. *United States* v. *Johnson*, 513 F.2d 819 (2d Cir. 1975).

Therefore, it is difficult to perceive how Rua satisfies the essential element requirement established in *Brown;* or, for that matter, how the Government is guilty of the "vice of prosecutorial self-contradiction", of concern to the Supreme Court in *Jones*, and as to which the court in *Brown* especially reserved decision. See, generally, Trager, *The Law of Standing Under the Fouth Amendment*, 40 Brooklyn Law Rev. 421 (1975).

court that he lacked standing to contest the validity of the search. The trial court permitted Rua's counsel to participate fully in the suppression hearing (S. 76). Appellant's counsel cross-examined the Government's witnesses and was permitted, but declined, to introduce evidence at the hearing (S. 72). Moreover, the trial court allowed appellant Rua's counsel to argue the suppression motion, even though Rua never moved prior to trial to suppress the evidence seized (S. 76, 86).[5] Clearly Rua can hardly argue that he suffered any harm from the trial court's ruling that he lacked standing.

## POINT III

### The district court fully complied with Title 18, U.S.C. § 3501(a).

Appellant Rua argues that the district court committed reversible error when it failed to conduct a hearing to determine the voluntariness of his statement to Special Agent Morrill on June 20, 1975. He claims that the hearing was mandated by Title 18, U.S.C. § 3501(a). Further, appellant Rua contends that Judge Platt failed to properly instruct the jury concerning the voluntariness of this statement, thus committing plain error. *United States* v. *Barry*, 518 F.2d 342 (2d Cir. 1975). Rua seeks to buttress his argument by alleging that he first learned just prior to jury selection of the existence of this statement.

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[5] Standing alone, Rua's failure to timely move to suppress would be enough to bar him from contesting the search of the truck. Rule 12(f) Federal Rules of Criminal Procedure, *United States* v. *Mauro*, 507 F.2d 802 (2d Cir. 1974), *cert. denied*, 420 U.S. 991 (1975).

Appellant's claims are without merit. To begin with, contrary to appellant's recital of the facts, the Government provided Rua's trial counsel in advance of trial with a copy of Rua's statement made on June 20, 1975, even though Rua's attorney never sought pre-trial discovery (see Stipulation of September 1, 1976). Moreover, no motion to suppress this statement was ever made by appellant Rua. Nor, was there any objection to its introduction at trial (T. 148, 149). Now, for the first time on appeal, appellant contends that Title 18, U.S.C. § 3501(a) required the trial court to conduct a hearing to determine the voluntariness of the admission before it could be introduced into evidence.

A reading of the statute clearly shows the lack of merit in appellant's argument. Title 18, U.S.C. § 3501 (a) states in pertinent part:

> Before such confession is received in evidence, the trial judge shall, out of the presence of the jury determine *any issue as to voluntariness*, (emphasis added).

At no time either in advance of trial or at the time the statement was introduced into evidence did appellant raise an issue as to the voluntariness of the statement. Therefore, the court properly allowed its introduction into evidence without a hearing. *United States* v. *Moffett*, 522 F.2d 1379, 1380-81 (5th Cir. 1975); *United States* v. *Stevens*, 445 F.2d 304, 305 (6th Cir.), *cert. denied*, 404 U.S. 945 (1971).[6]

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[6] In any event, the voluntariness of Rua's statement introduced in the Government's direct case can hardly be contested. This two-page written statement signed by appellant Rua clearly states on its face that Rua was advised, and that he understood, his Constitutional rights (T. 146-150). Moreover, Rua himself admitted the substance of this statement in his direct testimony and admitted supplying this information to the Federal Bureau of Investigation (T. 247-249, 255, 259-60).

Relying upon *United States* v. *Barry*, *supra*, where this Court found the trial court's failure to comply with Title 18, U.S.C. § 3501(a) s plain error requiring a new trial, appellant Rua also contends Judge Platt failed to give a specific charge on the issue of voluntariness.

A reading of the district court's charge pertaining to appellant Rua's statements, however, clearly shows full compliance with Title 18, U.S.C. § 3501(a).[7] Contrary

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[7] The pertinent portion of the district court's charge is as follows (T. 421, 422):

> Evidence relating to any statement or act or omission claimed to have been made or done by a defendant outside of Court, and after a crime has been committed, should always be considered with caution and weighed with great care; and all such evidence should be disregarded entirely, unless the evidence in the case convinces the jury beyond a reasonable doubt that the statement or act or omission was knowingly made or done.
>
> A statement or act or omission is "knowingly" made or done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.
>
> In determining whether any statement or act or omission claimed to have been made by a defendant outside of Court, and after a crime has been committed, was knowingly made or done, the jury should consider the age, sex, training, education, occupation and physical and mental condition of the defendant, and his treatment while in custody while under investigation, as shown by the evidence surrounding the making of the statement or act or omission, including whether, before the statement or act or omission was made or done, the defendant knew or had been told and understood that he was not obligated or required to make or do the statement or act or omission claimed to have been made or done by him; that any statement or act or omission which he might make or do could be used against him in Court; that he was entitled to the assistance of counsel before making any statement, either oral or in writing, or before doing any act or omission.

[Footnote continued on following page]

to appellant's erroneous assertion, Judge Platt went far beyond the general boiler plate instruction which was found insufficient in *United States* v. *Barry, supra.* The jury was properly instructed that it was its duty to determine if appellant's statements were voluntary after proper warnings had been given. The district court went on to fully explain the factors to weigh in making this determination. Therefore, the district court's instructions were in full compliance with the requirements of Title 18, U.S.C. § 3501(a).

## POINT IV

### The evidence against appellant Rua was sufficient to convict.

Appellant Rua also contests the sufficiency of the evidence which convicted him. This argument is devoid of merit. The evidence at trial showed that the 704 cases of stolen liquor were removed from Rua's warehouse three days after their theft (T. 68, 85). Further, the Government's proof established that Rua's business was operating at a net loss during this same period of time (T. 132). The jury was also entitled to infer that once Garcia was arrested in possession of the stolen liquor at Rua's warehouse, Rua fled for Puerto Rico, abandoning his business with its $60,000 inventory and an outstanding $80,000 SBA loan (T. 87, 121, 145). Moreover, once arrested, Rua admitted to FBI Agent Morrill that he had been ap-

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If the evidence in the case does not convince you beyond a reasonable doubt that a statement was made voluntarily and intentionally, you should disregard it entirely.

On the other hand, if the evidence in the case does show beyond a reasonable doubt that the statement was, in fact, voluntarily and intentionally made, you may consider it against the defendant who voluntarily made the statement.

proached to use his warehouse to store stolen goods for $1,000 a day (T. 149, Ex. 24).

Rua testified in his own behalf and denied involvement in the illegal possession. However, the jury could interpret his story as incredible and thus give further support to a contrary inference especially, in view of the fact that Rua was seriously impeached on the critical issue as to when he left for Puerto Rico. *United States* v. *Mariani*, — F.2d — (2d Cir.) Slip op. 898, decided July 19, 1976; *United States* v. *Arcuri*, 405 F.2d 691, 695 (2d Cir. 1968), *cert. denied*, 395 U.S. 913 (1969); *Dyer* v. *MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952).

## CONCLUSION

**The judgments of conviction should be affirmed.**

Dated: Brooklyn, New York
September 10, 1976

Respectfully submitted,

DAVID G. TRAGER,
*United States Attorney,*
*Eastern District of New York.*

ALVIN A. SCHALL,
GARY A. WOODFIELD,
*Assistant United States Attorneys,*
*Of Counsel.*

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# AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 10th day of September, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Frank Ortiz, Esq.
16 Court Street
Brooklyn, N.Y. 11201

Legal Aid Society
Federal Defender Services Unit
509 U.S. Courthouse - Foley Square
New York, N.Y. 10007

Evelyn Cohen

Sworn to before me this
10th day of Sept., 1976

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-46-5298
Qualified in Queens County
Term Expires March 30, 1977